ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 20 and 24 of the	)	
Commission's Rules -- Broadband PCS	)	WT Docket No. 96-59
Competitive Bidding and the Commercial	)	
Mobile Radio Service Spectrum Cap	)	
	)	
Amendment of the Commission's	)	
Cellular PCS Cross-Ownership Rule	)	GN Docket No. 90-314

COMMENTS OF RADIOFONE, INC.

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SUMMARY

Radiofone, Inc. (Radiofone) submits its comments in response to the Commission's Notice of Proposed Rule Making (Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap), WT Docket No. 96-59, GN Docket No. 90-314, FCC 96-119, released Mar. 20, 1996 [hereinafter NPRM].

Radiofone supports the Commission's proposal to eliminate the PCS/cellular cross-ownership rule, and requests the Commission to eliminate the related 45 MHz spectrum cap. Additionally, Radiofone submits that the D, E and F Block PCS auctions should be held separately and non-simultaneously, in order to give cellular carriers and other parties who are interested in obtaining 10 MHz of spectrum a fair opportunity to do so. Furthermore, Radiofone opposes the application of the "49% equity exception" (also referred to as the "Control Group Minimum 50.1 Percent Equity Option") to the D, E and F Block auctions, and supports the adoption of the exception to the affiliation rule as provided in Section 24.720(*l*)(11)(ii) for the C Block auction. Finally, Radiofone supports the extension of small business preferences to the D and E Block auctions.

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COMMENTS OF RADIOFONE, INC.

Radiofone, Inc. (Radiofone), by its attorney, hereby submits its comments in response to the Commission's Notice of Proposed Rule Making (Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap), WT Docket No. 96-59, GN Docket No. 90-314, FCC 96-119, released Mar. 20, 1996 [hereinafter NPRM]. Radiofone supports the Commission's proposal to eliminate the PCS/cellular cross-ownership rule, and requests the Commission to eliminate the related 45 MHz spectrum cap. Additionally, Radiofone submits that the D, E and F Block PCS auctions should be held separately and non-simultaneously, in order to give cellular carriers and other parties who are interested in obtaining 10 MHz of spectrum a fair opportunity to do so. Furthermore, Radiofone opposes the application of the "49% equity exception" (also referred to as the "Control Group Minimum 50.1 Percent Equity Option") to the D, E and F Block auctions, and supports the adoption of the exception to the affiliation rule as provided in Section 24.720(*l*)(11)(ii) for the C Block auction. Finally, Radiofone supports the extension of small business preferences to the D and E Block auctions.

I. The FCC Should Eliminate the PCS/Cellular Cross-Ownership Rule and the 45 MHz Spectrum Cap

The Commission proposes to eliminate the PCS/cellular cross-ownership rule in favor of the single 45 MHz spectrum cap. NPRM, para. 66. Radiofone wholeheartedly agrees that

the PCS/cellular cross-ownership rule should be eliminated. As held by the Sixth Circuit in Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752, 764 (6th Cir. 1995), that rule was the result of arbitrary decisionmaking because "[t]he record contains little or no factual support for" the PCS/cellular cross-ownership rule. There still is no evidence that would support such a rule. But eliminating the PCS/cellular cross-ownership rule does not go far enough. The Commission should also eliminate the 45 MHz spectrum cap, for many reasons.

First, the Commission's review of the PCS/cellular cross-ownership rule and the 40 MHz PCS cap necessitates a review of related caps, including the 45 MHz spectrum cap. NPRM, para. 66. Indeed, the NPRM itself underscores the need for a review of the 45 MHz spectrum cap. The NPRM, para. 66, references the Cincinnati Bell decision concerning the PCS/cellular cross-ownership rule, and immediately concludes that the Commission should look at "other spectrum caps" such as the 45 MHz spectrum cap and the 40 MHz cap on broadband PCS spectrum that can be held in any one geographic area. Thus, the NPRM acknowledges that modifications to the PCS/cellular cross-ownership rule necessarily involve a review of the closely related 45 MHz spectrum cap. Additionally, the NPRM, para. 70, acknowledges that the 20% attribution threshold in the 45 MHz spectrum cap was based on the 20% attribution threshold in the PCS/cellular cross-ownership rule, thereby once again acknowledging the relationship between those two rules. Furthermore, in proposing changes to the 20% attribution threshold for the 45 MHz spectrum cap, the FCC asked whether changes to that attribution threshold should be made depending on any changes that are made to the PCS/cellular cross-ownership rule and/or in light of the Cincinnati Bell decision. NPRM, para. 72. In sum, the NPRM acknowledges the interrelationship of these two rules, acknowledges that changes in the PCS/cellular cross-ownership rule may mandate that changes be made to the 45 MHz spectrum cap, and suggests that the Cincinnati Bell decision could affect the 45 MHz spectrum cap.

Second, while the NPRM compels a review of the 45 MHz spectrum cap, the Cincinnati Bell decision has the effect of requiring the FCC to eliminate the 45 MHz spectrum cap. The court stated:

> Before the FCC may foreclose such businesses as Radiofone from obtaining a thirty MHz Personal Communications Service license within their geographic region, it must provide something in the way of documentary support for its asserted fears that Cellular providers will detrimentally affect the market if allowed to become Personal Communications Service licensees.

Id. at 764 (emphasis added). Thus, because the 45 MHz spectrum cap "foreclose[s] such businesses as Radiofone from obtaining a thirty MHz Personal Communications Service license within their geographic region," the FCC must obtain "documentary support" before continuing to apply the rule to small cellular carriers. The court was well aware of the 45 MHz spectrum cap, id. at 765, when it held that the FCC may not prohibit Radiofone from obtaining a 30 MHz PCS license without sufficient support for such action. There is similarly no documentary support for imposing the 45 MHz spectrum cap on small cellular carriers. Limiting cellular carriers to 20 MHz (under the 45 MHz spectrum cap) is as arbitrary as limiting them to 10 MHz (under the PCS/cellular cross-ownership rule). And there is no justification for either limit.

Third, the need to eliminate the 45 MHz spectrum cap also results from the impact that the rule will have on cellular companies -- an impact that was not considered by the Commission when it adopted the rule. The Sixth Circuit noted the impact when it stated:

> The Cellular eligibility restrictions have a profound impact on businesses in an industry enmeshed in this country's telecommunications culture. The amounts of money at stake reach into the billions of dollars. The continued existence of some wireless communications businesses rests on their ability to bid on Personal Communications Service licenses. Indeed, at oral argument counsel for the FCC admitted that, given the uncertain nature of the future in the wireless communications market, Cellular providers foreclosed from obtaining Personal Communications Service licenses may ultimately be left holding the remnants of an obsolete technology.

Cincinnati Bell, 69 F.3d at 764. Because the 45 MHz spectrum cap has the same effect as the cellular eligibility restrictions referred to by the court, the impact on wireless communications

businesses is the same. Thus, the 45 MHz spectrum cap should also be eliminated.

Fourth, while retaining the 45 MHz spectrum cap could prevent cellular carriers from participating in new services, eliminating the 45 MHz spectrum cap would not adversely impact other CMRS providers. The FCC asked commenters to discuss the impact on competition among CMRS providers and the effect, "if any," on the provision of PCS. NPRM, para. 66. Permitting cellular carriers to obtain 30 MHz of broadband PCS spectrum would not detrimentally affect competition in CMRS. The FCC has defined the wireless market as including cellular, SMR, 220 MHz, interconnected Business Radio Service, conventional dispatch, paging and PCS. Order (Motorola, Inc.), 10 FCC Rcd. 7783, 7786 (Wireless Tel. Bur. 1995). Indeed, the Commission has used this fact to justify disregarding an economic analysis showing excessive concentration of PCS licenses. Memorandum Opinion and Order (Deferral of Licensing of MTA Commercial Broadband PCS), FCC 96-139, n.11, released Apr. 1, 1996 [hereinafter MTA MO&O]. Based on these Commission orders, cellular providers already face competition from a variety of other wireless services, and will soon face competition from the PCS winners. Permitting a cellular carrier to also have 30 MHz of PCS spectrum would not detrimentally impact a market that already consists of so many wireless service providers.

If anything, permitting small cellular carriers to obtain 30 MHz of PCS spectrum would permit those carriers to use their existing technical expertise in delivering quality wireless services. End users would only stand to benefit in such a situation. For example, the cellular carriers holding PCS licenses could provide mobile video services over the PCS frequencies. Thus, permitting small cellular carriers like Radiofone to obtain 30 MHz of PCS spectrum would only enhance the provision of PCS. And there would be no danger of licensees accumulating large amounts of spectrum. PCS licensees could still be subject to the 40 MHz cap, if the FCC were to retain that cap. See NPRM, para. 66. And cellular licensees would be subject to the limit on same-market cellular spectrum. 47 C.F.R. § 22.942.

Finally, the Cincinnati Bell decision has undermined any justification the Commission may have had for adopting the 45 MHz spectrum cap. The Sixth Circuit rejected the Commission's arguments concerning the purposes of the PCS/cellular cross-ownership rule. As the Commission argued to the Sixth Circuit, the PCS/cellular cross-ownership rule served the two-fold purpose of: (a) preventing cellular carriers from behaving anticompetitively; and (b) promoting diversity of license ownership. See Cincinnati Bell, 69 F.3d at 763-64. The Commission's Third Report and Order (Implementation of Sections 3(n) and 332 of the Communications Act), 9 FCC Rcd. 7988, 8108-10 (1994), indicates that the justifications for the 45 MHz spectrum cap are to prevent cellular carriers from artificially withholding capacity (i.e., behaving anticompetitively) and to promote diversity of license ownership. Thus, the underlying purposes of the 45 MHz spectrum cap and the PCS/cellular cross-ownership rule are substantially the same, and the Sixth Circuit rejected the Commission's arguments concerning those purposes, Cincinnati Bell, 69 F.3d at 762-64. In fact, the NPRM, para. 70, acknowledges the commonality between the two rules. Because the 45 MHz spectrum cap is clearly based on the same faulty justifications as the PCS/cellular cross-ownership rule and would have the same impact when applied to Radiofone and other small cellular carriers, it should be eliminated for all PCS auctions.

For the foregoing reasons, Radiofone respectfully requests the Commission to eliminate the PCS/cellular cross-ownership rule and the 45 MHz spectrum cap; or to modify these rules to accommodate small cellular carriers like Radiofone.

II. The D, E and F Block Auctions Should Be Separate and Non-Simultaneous

The FCC seeks comment on whether it should auction the D, E and F Blocks concurrently and together. Radiofone is on record advocating that small cellular carriers should have been given the opportunity to acquire one of the 30 MHz Blocks allocated to PCS, and

this view has not changed. However, Radiofone submits that the D, E and F Blocks should be auctioned separately and non-simultaneously for three reasons.

First, the spectrum for the D, E and F Blocks is not as contiguous as the spectrum for the A, B, and C Blocks. Therefore, the D, E, and F Blocks do not readily lend themselves to be combined into a 30 MHz block. In the A, B and C Blocks, each Block consists of a pair of 15 MHz bands. See Memorandum Opinion and Order (Amendment of the Commission's Rules to Establish New Personal Communications Services), 9 FCC Rcd. 4957, 4970 (1994) [hereinafter PCS MO&O]. By contrast, when the D, E and F Blocks are combined, there are four frequency bands: (a) 1865-1870 MHz; (b) 1885-1895 MHz; (c) 1945-1950 MHz; and (d) 1965-1975 MHz. See id. Thus, while clearing the spectrum for any of the A, B or C Blocks involves clearing two bands, clearing the spectrum for the combined D, E and F Blocks involves clearing four bands. Additionally, when establishing service on the A, B and C Blocks, the PCS licensee needs to consider any possible interference with licensees on the other side of the four endpoints of the two frequency bands. By contrast, when establishing service on the combined D, E and F Blocks, a PCS licensee would need to consider possible interference with licensees on the other side of the eight endpoints of the four frequency bands. Thus, the D, E, and F Blocks, when combined, are far inferior to any of the A, B and C Blocks due to the costs of spectrum clearing and the increased engineering concerns.

Second, by auctioning the D, E and F Blocks separately and non-simultaneously, the Commission would give those entities who desire to obtain a 10 MHz license a fair opportunity to do so. If the licenses were not auctioned together, there likely would be fewer applicants attempting to obtain all three licenses. Thus, those parties desiring to obtain one 10 MHz license would have a better chance to do so. In particular, cellular carriers who were unable to obtain licenses in the previous PCS auctions would be able to realistically compete for the 10 MHz licenses.

Finally, separate, non-simultaneous auctions would help preserve the diversity of spectrum block sizes.

> In its auction rules, the Commission has properly balanced these objectives [of Section 309(j)(3)(A), (C) and (D)] with the Section 309(j)(3)(B) goal of diversity of ownership by establishing PCS frequency blocks of varying sizes and service areas, reserving certain of these blocks for entrepreneurs, and creating special provisions for designated entities to bid for licenses in those blocks.

MTA MO&O, para. 10 (citation omitted) (emphasis added). Thus, separating the 10 MHz auctions would help to preserve the Commission's intent to comply with the Act through diverse spectrum blocks.

In sum, to create opportunities for parties to obtain 10 MHz licenses, separate, non-simultaneous auctions should be held for the D, E and F Blocks. As discussed above, Radiofone is on record as advocating rule changes that would help small cellular carriers and others to obtain a 30 MHz license. However, the Commission should not eliminate 10 MHz licenses as an option for those parties who desire them.

III. The 49% Equity Exception Should Not Be Allowed in the D, E or F Block Auctions Because It Will Lead to "Back Door Control" of All Remaining Licenses by Large Businesses

Radiofone believes that the Commission should not allow participants in the D, E or F Block auctions to use the 49% equity exception, as it did with the C Block auction, because it will foreclose the remaining opportunities for small businesses and entrepreneurs to participate in broadband PCS and lead to "back door control" of the 10 MHz licenses by large businesses.

In the Fifth Report and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 9 FCC Rcd. 5532 (1994), the Commission struck a balance between two significant statutory objectives -- preserving opportunities for small and minority- or women-owned businesses and promoting access to capital for small businesses. The FCC crafted certain exceptions whereby companies which were ineligible to own licenses reserved for entrepreneurs could make "passive" investments in eligible entrepreneurs.

Specifically, the Commission permitted small business applicants to obtain up to 75 percent of the equity they would need to obtain licenses and build their PCS system(s) through investments by larger (non-entrepreneur) entities. As long as an identified "control group" retained 25 percent of the equity and at least 50.1 percent of the voting interests (and all of the general partnership interests), each of these larger entities could hold up to 25 percent of the applicant's equity without affecting the applicant's eligibility as an entrepreneur.

In striking this balance, the Commission explained that:

> the 25 percent limitation on equity investment interests will serve as a safeguard that the very large entities who are excluded from bidding in these blocks do not, through their investments in qualified firms, circumvent the gross revenue/total asset caps.

Id. at 5601-02. Therefore, the Commission has expressed a concern that allowing equity investment of greater than 25 percent by non-entrepreneur companies in an entrepreneur may allow these "very large entities" to control licenses that were really intended for entrepreneurs.

The Commission had a differing viewpoint with respect to permissible equity structures for minority- and women-owned businesses. To address the unique financing problems experienced by these entities, its rules would allow a single company that was not eligible for the entrepreneurs' block to own up to 49.9 percent of a minority- or women-owned business. Presumably, the risk of allowing large companies to have a larger stake in a discrete subset of entrepreneurs -- those owned by minorities or women -- was outweighed by the potential benefit to these preferred groups in terms of promoting access to capital.

However, as the dissenting opinion in Omnipoint Corp. v. FCC, No. 95-1374, slip op. (D.C. Cir. Mar. 8, 1996) (Wald, J., dissenting in part), observed, the Commission made an abrupt and inadequately explained about-face, in response to the Supreme Court's decision in Adarand Constructors v. Peña, 115 S. Ct. 2097 (1995), when it extended this 49% equity exception to all small businesses rather than limiting all applicants to 25 percent investments by large companies. Judge Wald described the Commission's initial reasoning as follows:

> [I]n setting forth the initial auction rules, the Commission explicitly declined to extend the 49.9 percent equity option to all C block applicants because of its concern that . . . the opportunity to make such a substantial investment in all C block entities, rather than just minority- and women-owned businesses, would allow large companies to exercise too much control over too many licenses that are targeted for small businesses.

Omnipoint, slip op. (Wald, J., dissenting in part). But in the Commission's post-Adarand world, its rational concern about non-entrepreneurs controlling the C Block simply vanished, without explanation. And the court never addressed the issue raised by Omnipoint of whether extending the 49% equity exception to all small businesses would undermine the purpose of the C Block auction.

The Commission previously had justified the extension of the 49% equity exception, rather than its elimination, on the fact that many minority- and women-owned businesses planning to participate in the C Block auction had established equity structures based on this provision. In upholding the rule change, the Omnipoint majority found that the Commission properly took into account the reliance interests of affected parties. Omnipoint, slip op. at 18.

By contrast, potential F Block auction applicants have known that the Commission may modify the rules for that auction, see Further Notice of Proposed Rule Making (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 10 FCC Rcd. 11,872, 11,873 & n.6 (1995), and potential D and E Block auction applicants have known that those auctions may be combined with the F Block auction, see NPRM, para. 84. Thus, there is no reliance interest which would justify an extension of the 49% equity exception here. Additionally, because no 10 MHz broadband PCS licenses have been issued and large businesses will not have a "headstart" over entrepreneurs in this regard, time considerations do not compel an extension of the 49% equity exception, as the Commission stated such considerations did in the Sixth Report and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 11 FCC Rcd. 135, 146 (1995). Therefore, the Commission should preserve the remaining broadband PCS licensing opportunities for "true"

entrepreneurs, not for very large businesses that masquerade as entrepreneurs and which exercise back door control.

A. Extending the 49% Equity Exception to the D, E and F Blocks Would Violate the FCC's Statutory Obligation to Provide Opportunities for Small Businesses

The Commission's proposal to extend the 49% equity exception to the D, E and F Block auctions would violate the FCC's statutory obligation, found in Section 309(j)(3)(B) of the Act, to disseminate licenses among a wide variety of applicants, including small businesses. In its PCS MO&O, the Commission recognized its obligation under Section 309(j) of the Act and adopted a revised band plan and eligibility rules designed "to promote economic opportunity by disseminating licenses to a wide variety of applicants." 9 FCC Rcd. at 4962.

Since the FCC's rules have allowed the 30 MHz A, B and C Block auctions to be dominated by very large companies, the 10 MHz D, E and F Blocks represent the last broadband PCS licenses available for small businesses and entrepreneurs. The Commission is able to prevent these very large companies from exercising too much control over entrepreneurs, and promote economic opportunity for a wide variety of applicants, by limiting the maximum equity non-entrepreneurs may own in these businesses. Therefore, the FCC should restrict the use of the 49% equity exception to holders of the C Block licenses only.

B. Permitting Very Large Companies to Make 49.9 Percent Equity Investments in Entrepreneurs Will Change the Character of the 10 MHz Auctions

Radiofone believes that permitting very large companies to make 49.9 percent equity investments in small businesses and eligible entrepreneurs will change the character of the 10 MHz D, E and F block auctions and foreclose opportunities for true entrepreneurs. One need only look at the results of the C Block auction, with BTA bid prices escalating far beyond the amounts bid on comparable A and B Block MTA licenses, to see that entrepreneurs and small businesses without substantial equity from large companies never stood a chance of

obtaining a 30 MHz license in one of the more desirable BTA markets.

Quite simply, the Commission's extension of the 49% equity exception to all C Block auction participants "stacked the deck" against entrepreneurs without Fortune 500 backing. Permitting this equity structure to be used in the D, E and F Block auctions is only inviting a repeat performance of the C Block auction. The Commission should avoid this undesirable result.

IV. The Commission Should Extend Small Business and Entrepreneur Benefits to the D and E Blocks and Limit the Eligibility for All Remaining Licenses to "True" Entrepreneurs

Consistent with its proposal in the NPRM, the Commission should extend the same small business and entrepreneurs' block provisions to the D and E Blocks that it adopts for the F Block. Moreover, since non-entrepreneurs have had an opportunity to obtain all of the 30 MHz licenses they want, either directly or through substantial equity investments in C Block auction participants, the Commission should limit eligibility for all of the 10 MHz licenses to these "true" entrepreneurs.

V. The Commission Should Retain Its C Block Definition of a "Small Business" and Current C Block Attribution Rules

Radiofone believes that the Commission should retain the definition of a "small business" which it used for the C Block auction, along with its current C Block attribution rules. Section 24.720(b) of the Commission's rules sets forth a definition of a small business as "an entity that, together with its affiliates and persons or entities that hold interest in such entity and their affiliates, has average annual gross revenues that are not more than $40 million for the preceding three years." 47 U.S.C. § 24.720(b)(1). In accordance with the C Block eligibility criteria, all entrepreneurs must have total assets of less than $500 million at the time the applicant's short-form application (Form 175) is filed. 47 U.S.C. § 24.709(a)(1). The Commission selected this definition in order "to ensure the participation of small businesses

with the financial resources to compete effectively in an auction and in the provision of broadband PCS services." Fifth Report and Order, 9 FCC Rcd. at 5608.

An all-important component of the FCC's financial thresholds for the C Block auction are the rules for determining at what point an investor should be deemed an "affiliate" and its gross revenues and total assets should be counted toward the total for an entrepreneurs' block applicant. Guided by the Small Business Administration's (SBA's) rules, the Commission adopted a notion of affiliation which hinged on the ability of an entity to control an applicant. This was designed to "ferret out" businesses or entities that did not meet the relevant size restrictions and prevent them from receiving benefits targeted to smaller entities. Id. at 5619. Accordingly, Section 24.720(*l*) of the Commission's rules defined such "affiliates" broadly.

In the Sixth Report and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding), 11 FCC Rcd. 136, 154 (1995), the Commission amended Section 24.720(*l*)(11)(ii) of its affiliation rules by allowing small business applicants to exclude the gross revenues and total assets of any affiliate that would qualify as an entrepreneur, as long as the aggregate of all affiliates of the applicant did not exceed the entrepreneurs' block financial eligibility thresholds. Reasoning that small businesses should not be penalized for having affiliates which, in the aggregate, met these entrepreneurs' block eligibility standards, the Commission concluded that this particular modification "would not present an unfair competitive advantage in the auction." Id. at 155.

Radiofone believes the Commission's rationale for modifying Section 24.720(*l*)(11)(ii) for the C Block auction still holds true, and no unfair competitive advantage would be enjoyed by any applicants that, but for their entrepreneur affiliates, would qualify for small business benefits. The only real unfair competitive advantage comes from allowing non-entrepreneurs to individually provide more than 25% of an applicant's equity, as discussed above. Therefore, Radiofone supports the extension of the Commission's C Block definition of a "small business" and C Block affiliation rules to the D, E and F Block auctions.

WHEREFORE, in light of the foregoing, Radiofone respectfully requests that the Commission act in accordance with the preceding comments.

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